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STATE OF WASHINGTON

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No. 14-2-00015-6

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

KRISTI FREEMAN AND THE DEPARTMENT OF LABOR AND
INDUSTRIES OF THE STATE OF WASHINGTON

Appellants,

v.

WILLAPA HARBOR HOSPITAL

Respondent,

APPELLANT'S REPLY BRIEF

Oscar Chaves, WSBA #34951
Atlas Law, PS
PO Box 7040
Olympia, WA 98507
(360) 528-8808
Attorney for Kristi Freeman

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I. Summary of Reply

An order granting a CR 35 exam without establishing good cause is an abuse of discretion and must be reversed. Here, the Self-insured Employer (SIE) filed a motion for a CR 35 exam in superior court after appealing a final decision by the Board of Industrial Insurance Appeals that ordered allowance of Ms. Freeman's mental health condition under her worker's compensation claim. The only support the SIE proffered in support of its motion was a self-serving affidavit by its legal counsel that contained conclusory allegations. The Board record fails to support the SIE's allegations. No good cause establishes the need to remand Ms. Freeman's matter back to the Board to compel Ms. Freeman to attend another mental health exam with the SIE's psychiatric witness.

II. The SIE's psychiatric expert was not persuasive because he misstated the medical records which formed the basis of his opinion.

The Self-insured Employer (SIE) argues that good cause requiring Ms. Freeman to be subject to a court ordered mental health exam is established by the fact that the Board of Industrial Insurance Appeals' final decision found the SIE's only psychological expert, Dr. Schneider, lacked credibility. Resp. Br. at 6. Ms. Freeman agrees the Board did not find Dr. Schneider's testimony persuasive. See CBR 41-42. However, Ms. Freeman disagrees with the Self-insured Employer's "belief" that Dr. Schneider's lack of persuasiveness was a result of the Board's denial of its motion for a CR 35 examination. Rather than posit an alternative "belief" for why the Board ruled as it did, Ms. Freeman notes the Board's final order actually articulated its rationale for why Dr. Schneider was not persuasive. Specifically,

"Dr. Schneider testified that he based his opinion that Ms. Freeman did not have a mental health condition diagnosed as a pain disorder, at least in part, on this understanding that "[n]one of the practitioners that saw Ms. Freeman" thought that her pain was caused by emotional or mental problems. Schneider Dep. at 33-34. This statement is inconsistent with the record. Dr. Hill, Ms. Freeman's long-standing family doctor and her attending physician, referred Ms. Freeman to Dr. Meier for mental health treatment under this claim.

In addition, Dr. Schneider testified that "there appeared to always be reason to believe that her pain was a consequent of her bodily dysfunction and was not ... in her head." Schneider Dep. at 33-34. While it is true that there is some mention in the record that Ms. Freeman had swelling three months after her surgery and a post-operative arthogram showed mild cartilage irregularity, Dr. Sherfey, the surgeon who performed Ms. Freeman's right knee surgery, testified that from his perspective, Ms. Freeman had recovered from her surgery as expected with no complications and that her pain complaints exceeded what he would have expected based on objective findings. Dr. Jones, who testified for the self-insured employer, also could not identify any anatomic cause of Ms. Freeman's right knee pain.

Finally, Dr. Schneider's opinion that Ms. Freeman has no mental health condition proximately caused by her industrial injury is not very persuasive in light of his recommendation for Ms. Freeman to see Dr. Meier or someone "with comparable credentials" in pain psychology" for help adjusting to her disappointment about not having the surgical outcome she expected and uncertainty about the future. Schneider Dep. at 44. He specifically testified that someone like that could give Ms. Freeman "strategies and exercises that would be helpful to her in adapting to her chronic pain." Schneider Dep. at 44. Regardless of what label he may have put on her condition, it does not make sense to recommend treatment for a mental health condition that he testified did not exist."

CBR 41-42.

As the SIE notes, Dr. Schneider's ability to provide a persuasive opinion must be based on the most accurate information. Resp. Br. at 9-10. Here, Dr. Schneider's failure to base his opinion on the most accurate information was not because he did not have a second opportunity to examine Ms. Freeman. Rather, Dr. Schneider lost credibility due to his inaccurate recount of the medical records that he had reviewed. The Employer cannot now, after the matter has proceeded through litigation and a final order from the Board, correct Dr. Schneider's testimony under the guise of needing to reexamine Ms. Freeman. The SIE's desire to amend Dr. Schneider's testimony is not a proper basis for finding good cause to grant a CR 35 mental health exam.

III. The SIE was provided all of Ms. Freeman's medical and psychological records and provided more than fair and reasonable opportunity to have those records reviewed by their own psychiatrist witness.

The Self-insured Employer (SIE) further argues that good cause exists because it was not given a fair and reasonable opportunity to have Dr. Schneider evaluate "new information" generated by Drs. Meier and Hart. Resp. Br. at 9. The SIE's assertion is again counter to the uncontested evidence in the record.

The SIE was provided fair and reasonable opportunity for Dr. Schneider to evaluate Drs. Meier and Hart's evaluations. The SIE was provided Dr. Meier's notes and Dr. Hart's evaluation far in advance of Dr. Schneider's testimony.¹ Dr. Schneider noted his review of Dr. Meier's records for the SIE in an addendum report dated October 8, 2012.

¹ Dr Schneider testified on July 25, 2013. CBR Schneider Dep. 1. The Self-insured Employer asserts they received notice of Dr. Meier's opinion on or about December 12, 2012 and Dr. Hart's evaluation on or about March 8, 2013. Self-insured Employer's Response Brief at 3 and 4.

CBR 130-31. Dr. Schneider addendum report never raised an issue regarding a need to examine Ms. Freeman again. CBR 130-31. The SIE also received a copy of Dr. Hart's report within a month of Dr. Hart's evaluation of Ms. Freeman. Resp. Br. at 4.

Additionally, Dr. Schneider was provided copies of the transcripts of both Drs. Meier and Hart's testimony, as they had both testified almost two-and-a-half months before Dr. Schneider.² Schneider Dep at 11: 22-25; 12:1. These facts support a finding that the SIE was not only provided ample opportunity to evaluate the records of both Drs. Meier and Hart, but the Self-insured Employer also did in fact take advantage of its opportunity to have Dr. Schneider evaluate all the submitted information and evidence in regards to Ms. Freeman's mental and physical health.

The SIE also alleges that Dr. Hart's report provides good cause for its motion for a CR 35 exam in that the report indicated Ms. Freeman's mental health condition had worsened after Dr. Schneider's evaluation. Resp. Br. at 4. The SIE's assertion is again counter to the uncontested evidence in the record. The only support for the SIE's allegation regarding Dr. Hart's report is an affidavit from the SIE's counsel. Resp. Br. at 4. However, Dr. Hart's report was never introduced into the Board record to corroborate the SIE's allegation. Furthermore, no witness testified to Ms. Freeman's mental health condition worsening after Dr. Schneider's evaluation. Regardless, the SIE alleges that Dr. Meier's testimony suggested that Ms. Freeman's mental health appeared to have deteriorated in the two months between Dr. Schneider and Dr. Meier's evaluation. Resp. Br. at 10. Dr. Meier never testified to Ms. Freeman's mental health deteriorating after Dr. Schneider's evaluation.

² Dr. Hart testified on May 14, 2013. CBR Hart Dep. at 3. Dr. Meier testified on May 15, 2013. CBR Meier Dep. at 3.

Ultimately, the difference between Dr. Schneider and Dr. Meier's opinion was not due to the opportunity to review any allegedly new information. The difference in opinion follows the difference in approach and methodology used by both examiners. Where Dr. Meier utilized tests and written self-evaluation forms along with an interview of Ms. Freeman³, Dr. Schneider simply relied on his inaccurate record review and interview of Ms. Freeman. As Dr. Schneider testified,

"So in this case, having reviewed her records... I sat down with Ms. Freeman and said, "Ms. Freeman, here is the record. Here are the things that I have felt were significant in terms of what I could see is important... Then I ask her to tell me, as I always do what's happened since then[.]"

CBR Schneider Dep. 21-22.

Noting that Dr. Meier's and Dr. Schneider's evaluations was a mere 2 months apart, the difference between the evaluations was not due to access to any new information, but rather telling of Dr. Schneider's biased evaluation and minimal investment in other forms of evaluating Ms Freeman. Dr. Schneider's lack of thoroughness in his evaluation is corroborated by the inaccuracy of Dr. Schneider's testimony regarding his summary of Ms. Freeman's medical records.

Ms. Freeman also respectfully notes that the above points of difference were brought out in testimony by the SIE and not Ms. Freeman⁴. Simply because the SIE may have remorse for bring up an issue of its own creation, Ms Freeman should not be subject to suffer further invasion of her privacy; suffer emotional distress from submitting

³ CBR Meier Dep at 6:6-14.

⁴ The Self-insured Employer Response Brief at 13 cites to Schnider Dep. At 23 (direct examination by Self-insured Employer) and Meier Dep at 25-26 (cross-examination by Self-insured Employer).

to another mental health exam by Dr Schneider, a medical witness that has already testified adversely to Ms. Freeman's contentions; accrue additional financial expenses related to having her medical witness review the results of her court-ordered exam; accrue additional costs related to having her medical witnesses testify as to the exam results, including the exams medical relevance and validity; be placed in a position to be called by the SIE to testify again; and accrue additional attorney fees.

IV. RCW 51.52.110 does not provide the SIE the right to compel Ms. Freeman to attend a second exam by Dr. Schneider

The Self-insured Employer (SIE) alleges it was denied due process when it was not allowed to exercise its right to have Ms. Freeman examined by Dr. Schneider for a second time, pursuant to RCW 51.52.110. Resp. Br. at 6 and 12. However, the plain language of RCW 51.52.110 does not articulate any such right. RCW 51.52.110 speaks exclusively to the procedures for appealing a board decision to superior court.

The SIE may be referring to RCW 51.36.070. RCW 51.36.070 speaks to when an injured worker is to submit to an examination at the request of an employer. However, RCW 51.36.070 is inapplicable to litigation before the Board of Industrial Insurance Appeals. Chapter 51.36 RCW, which includes RCW 51.32.070, contains the Medical Aid statutes of the Industrial Insurance Act and relate to the management of claims by the Department of Labor & Industries and Self-insured Employers. The statutes that apply to litigating appeals before the Board of Industrial Insurance Appeals are contained within Chapter 51.52 RCW. Once a claim has been appealed to the Board of Industrial Insurance Appeals, the protections provided by civil rules apply. RCW

51.52.020 (Board's rule-making authority); WAC 263-12-125 (Application of Civil Rules); In Re: Adelbert V. Farr, BIIA Dec., 88 0699 (1989). These protections include the requirement for the SIE to move for an order from the Board to compel an injured worker to attend an evaluation regarding the issue in contention. CR 35.

V. Case law supports reversing the Pacific County Superior Court order compelling Ms. Freeman to attend CR35 exam.

Case law supports Ms. Freeman's contention that the Self-insured Employer (SIE) must come forward something beyond self-serving affidavits of its counsel to establish good cause for a court order compelling her to attend another psychological exam under CR 35. These cases include Shumway v. Marion and In re: Welfare of Green. 155 Wash. 60, 283 P. 444 (1929) and 14 Wn. App. 939, 546 P.2d 1230 (1976), respectively.

The SIE dismisses Ms. Freeman's application of Shumway to her appeal. Reps. Br. at 13. In Shumway, the Washington State Supreme Court found that a trial court did not abuse its discretion in denying a motion for a court order examination in a personal injury suit. Shumway v. Marion, 155 Wash. 60, 283 P. 444 (1929). There, the Court was tasked with interpreting a statutory clause regarding when a court may order and direct a physical or mental exam of a plaintiff. Id at 62. The Court found that the statute left a trial court with discretion in determining when such an exam would be appropriate. Id. Then, and as Ms. Freeman notes, the court found that a court did not abuse its discretion in denying a motion to compel such an exam when the plaintiff had already attended an exam at the requesting party. Id. As the Court noted, the requesting party

did not show a change of circumstances that would warrant the need for another exam. Id. Ms. Freeman's case is factually similar in the sense that CR 35 also provides a trial court discretion in determining good cause to order a mental health exam. In Ms. Freeman's case, like that facts in Shumway, the SIE had Ms. Freeman attend a mental health exam by a physician of their choice. And, like in Shumway, the SIE failed to establish a change in circumstances that would warrant remanding Ms. Freeman's claim back to the Department and to compel Ms. Freeman to attend another exam by Dr. Schneider at this time.

It is the Washington State Supreme Court's commonsense rationale that Ms. Freeman asserts as persuasive in the context of her appeal regarding whether the SIE has established good cause in support of their CR35 motion. The record on review shows that Ms. Freeman's mental health condition did not worsen after Dr. Schneider's exam. Following the Washington State Supreme Court's rationale in Shumway, this court should find that the record in Ms. Freeman's case fails to support good cause to compel Ms. Freeman to attend a second exam with Dr. Schneider as the SIE failed to establish a change of circumstances after the parties had fully litigated the issue of Ms. Freeman's claim at the Board.

This court, in In re: Welfare of Green, recognized that the appropriateness of a CR 35 exam can vary and must be evaluated in the context of case. 14 Wn. App. 939, 942, 546 P.2d 1230 (1976). A movant need not prove his case on the merits in order to be granted a mental health examination. Id. at 943. However, in Ms. Freeman's case,

which is an appeal of a Board of Industrial Insurance case, the superior court had the opportunity to evaluate all the evidence to include whether Ms. Freeman ever introduced or argued evidence of subsequent worsening after Dr. Schneider's exam. The record shows that Ms. Freeman did not introduce any such evidence nor argued for such a conclusion. As such, the SIE's allegation of Ms. Freeman subsequent worsening is unfounded and therefore cannot form a basis for good cause for a CR35 exam. Without good cause, the Pacific County Superior court order must be reversed.

VI. Conclusion

The ultimate issue on appeal is whether the superior court erred in granting the Self-insured Employer's motion for a CR 35 mental health exam after the parties had fully litigated the allowance of her mental health condition at the Board of Industrial Insurance Appeals. Ms. Freeman contends the superior court's order is not supported by good cause as alleged by the Self-insured Employer (SIE). The SIE failed to provide any medical opinion or request from Dr. Schneider or any other medical provider that articulates a need for Dr. Schneider to examine Ms. Freeman again. Instead, the SIE offered a self-serving affidavit by its own legal counsel which only contained conclusory, if not speculative, allegations that were not supported by the Board record on appeal. As noted in Ms. Freeman's opening brief, a conclusory allegation falls short of an affirmative showing of good cause to compel Ms. Freeman to attend a second exam by the SIE's psychiatric witness. As it is error for a trial court to compel a mental health exam under CR 35 without establishing good cause, the Pacific County Superior Court's order remanding Ms. Freeman's matter back to the Board of Industrial Insurance

Appeals with direction to compel Ms. Freeman to attend another mental health exam with Dr. Schneider must be reversed.

Dated this 31st day of March, 2015.

Respectfully submitted,
Atlas Law, P.S.

By: _____

Oscar Chaves
WSBA No. 34951
Attorney for Appellant

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CERTIFICATE OF MAILING

I, Michelle L. Roe, hereby certify that I mailed the foregoing Court of Appeals Appellant's Reply Brief to the following individual(s) on the date shown by causing to be mailed to said individual(s) the original, certified by me as such, contained in a sealed envelope, with postage prepaid, addressed to said individual(s) at the address below, to wit:

Joel Saks, Director
Department of Labor and Industries
PO Box 44000
Olympia, WA 98504-4000

Penny Allen, WSBA #18821
Office of the Attorney General
PO Box 40121
Olympia, WA 98504-0121

David Crossland, WSBA #1721
Thomas G. Hall & Associates
PO Box 33990
Seattle, WA 98133-0990

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and deposited same in the post office at Olympia, Washington on said date.

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Michelle L. Roe, Legal Assistant